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January 11, 2011

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: *Ex Parte Notice* WT Docket No. 05-265

Dear Ms. Dortch:

In previous submissions Bright House Networks (BHN) has emphasized the public policy benefits of wholesale data roaming requirement and the need for a sure-footed data roaming requirement for new entrants, like itself, in the wireless area.[1] Such a requirement must go hand-in-hand with an expeditious administrative remedy that allows those seeking roaming to obtain access at reasonable rates and conditions. Commenters, including BHN, have advocated different approaches to obtain a regulatory backstop if negotiations at the wholesale level fail[2].

BHN's entry into the wireless broadband market will build on its regional presence as a leading provider of wireline services such as phone, broadband, advanced video, and dedicated commercial fiber services. Its objective would be to provide facilities-based wireless broadband service in region to the maximum extent practicable. Wireless broadband is a significant pathway to greater broadband adoption, as the FCC recently highlighted.[3] BHN anticipates that

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[1] Letter to Marlene H. Dortch from Bright House Networks, WT Docket No. 05-265, Dec. 2, 2010 (attaching affidavit of Mr. Leo Cloutier, BHN Senior Vice President WT Docket No. 05-265); Letter to Marlene H. Dortch from Bright House Network, WT Docket Nos. 05-265 *et al.*, Oct. 22, 2009; Comments of Bright House Networks, WT Docket No. 05-265 (filed Sept, 30, 2009). *See* Reply Comments of Bright House Networks, WT Docket No. 09-66 (filed July 13, 2009).

[2] For instance, BHN has mentioned FCC invocation of the provider's retail yield to determine whether a proposed wholesale rate is reasonable, but a range of approaches is possible, as this letter outlines.

[3] "Today ...mobile broadband is an important Internet access platform that is helping drive broadband adoption[289] and data usage is growing rapidly.[290]" *Preserving the Open Internet, Broadband Industry Practices, Report and Order*, GN Docket No. 09-191, WC Docket No. 07-52, ¶94 (2010) (footnote 289 citing comments of Comments of Latinos for Internet Freedom: "Lower barriers to adoption have facilitated the widespread use of the mobile Internet in communities of color and low-income areas,

its customers would use the service primarily in region. BHN recognizes that to be a full service wireless broadband provider, however, it must also accommodate customers when they travel beyond where BHN facilities are located. Wholesale roaming agreements are the way to achieve that additional necessary customer feature.

Unlike the more competitive wholesale conditions present when roaming was introduced in the CMRS voice context, there are fewer potential data roaming providers in many parts of the country. The record established in this docket attests to the need for a data roaming requirement for current broadband wireless providers, let alone for potential entrants like BHN. To commit the level of investment needed to provide a competitive, facilities-based wireless data service in its service areas, BHN must be assured that potential customers can be offered near-ubiquitous service – akin to wireless voice services – when they travel outside of BHN's home service areas.

The two major incumbent providers vigorously oppose both the establishment of a wholesale data roaming requirement as well as any pricing backstop. Their policy opposition to a wholesale data roaming requirement is based on their assertion that establishing such a duty will lead to less investment in their networks at the very time that the need for more wireless capacity to meet growing consumer demand will increase dramatically.

There is no disagreement as to the predicted steep rise in the demand curve for wireless spectrum and the need for investment by providers to meet that need. BHN agrees with the large incumbents on this score.

The dispute centers on what is the best way to meet that demand: through further consolidation of data traffic to incumbents by denying new entrants the *sine qua non* of wholesale data roaming; or through facilities-based competition by new and established communications providers, with a back-up right to obtain roaming at reasonable rates.[4] Based on over 40 years of national policies to expand market entry and competition, the question answers itself.

National wireless policy must consider the investment incentives of all competitors, large and small, actual and potential. From this perspective, BHN's potential multi-million dollar investment into a wireless data service, as outlined in the affidavit submitted by BHN's Senior Vice President, Strategy and Business Development, will directly help to meet this need for more

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where many individuals would otherwise go without Internet access altogether .... [M]any of our constituents rely exclusively on mobile wireless Internet access as their onramp to the web.")

[4] If, as the incumbents argue, there is no doubt that they enter into arms-length data roaming agreements, then they should have no quarrel with a back-up provision that will, in their view, never be needed to enforce roaming rights. *See Letter from AT&T, WT Docket No. 05-265, Nov. 23, 2010*, at 1 ("The record in this proceeding unequivocally demonstrates that data roaming agreements are now widespread thought the industry and that wireless broadband providers of all sizes are successfully negotiating appropriate data roaming arrangements on a private carriage basis."). *See Letter from Verizon, WT Docket No. 05-265, Nov. 23, 2010*, at 1 ("Verizon Wireless explained that parties advocating a data roaming requirement have failed to prove that market forces are not working to ensure that data roaming agreements are negotiated among carriers that desire such agreements.") If this is accurate (multiple submissions from wireless carriers seeking such wholesale agreements disagree), incumbents should view a data roaming requirement as a regulatory belt duplicating the efforts of their own voluntary suspenders.

wireless infrastructure and capacity.[5] It will help to alleviate the very pressure that the incumbents rightly argue is coming from ever-expanding wireless data usage.

And its entry does so in a manner that adds *competition*, not *concentration* to the market of existing providers. BHN's entry means more choice in the markets it enters. And data roaming will assure customers who elect BHN service that on occasions when they are out of BHN's facilities-based service area, they will continue to be able to obtain wireless data service based on BHN's wholesale arrangements with other carriers at reasonable rates. In practical terms, for BHN customers this means not having to buy a throw-away phone, scout out a free hot-spot, or purchase second subscriptions when out of region.

As to reasonable rates, AT&T argues that any imposition of data roaming is tantamount to imposition of common carrier regulation, and "the Commission could not lawfully impose such obligations in the absence of compelling evidence that there has been a fundamental breakdown in the marketplace – and there is none here."[6] As AT&T asserts in another, more direct way, "It is, in other words, about *rate* regulation of data roaming because any mandate to provide data roaming ultimately begs the question 'on what terms?'"[7] It fears that "the risks of getting the rates and terms wrong are enormous."

AT&T seems to argue that the only way the FCC could insure reasonable rates is through a common-carrier approach; and that such a scheme is seriously at odds with the pro-investment policy needed to expand broadband infrastructure.[8] Moreover, the incumbents insist as a legal matter that data roaming is PMRS and therefore no common carrier regulations, including price regulations, can apply, under Section 332(c)(2).[9]

Putting aside the extensive discussion in the record of the regulatory classification of data roaming service for the moment[10], both of these incumbent arguments seriously overstate what

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[5] *See* Letter to Marlene S. Dortch, Dec. 2, 2010, *supra* note 1.

[6] *Id.*, p. 4, n.14.

[7] *Id.*, p. 4 (emphasis in original).

[8] "Common carrier regulation, however, would not be merely unnecessary (and unlawful); it would be affirmatively harmful and contrary to the Commission's core goals." *Id.*

[9] 47 U.S.C. § 332(c)(2).

[10] BHN pauses, however, to include in the record of this proceeding two developments that further establish FCC authority to mandate wholesale data roaming. *First,* in *Preserving the Open Internet, Broadband Industry Practices, Report and Order*, GN Docket No. 09-191, WC Docket No. 07-52, *supra* note 3, the FCC emphasized that "functional equivalents" of services should to be treated the same as the corresponding service. *See* 47 C.F.R. § 8.11(a) (definition of Broadband Internet Access service "encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence"). The *Report and Order* also invokes the concept of "functional equivalent" to exempt application stores from the scope of the prohibition on blocking competing voice or video telephony services by mobile operators. ¶ 102 ("The prohibition on blocking applications that compete with a broadband provider's voice or video telephony services does not apply to a broadband provider's operation of application stores or their functional equivalent.") These invocations of functional equivalence in the *Report and Order* support the view that services like wholesale data roaming, which is the functional

proponents of wholesale rate oversight have proposed.[11] In particular, even assuming *arguendo* that data roaming was classified as PMRS (and BHN does not agree with that legal conclusion), as the following discussion shows, the FCC has engaged in a variety of rate regulation that has no connection to Title II/common carrier rules. Incumbents therefore seriously understate the Commission's experience and ability to insure reasonable wholesale rates in ways that do not draw the agency into traditional common carrier regulation.

Parties seeking wholesale data roaming do need some reasonable way to obtain market-based rates. It is neither in the buyer or the seller's interest to resort to complicated rate-setting schemes in the fast-moving wireless broadband space. BHN believes that in many cases the parties will reach arms-length deals without the need for regulatory intervention.

On the other hand, incumbents' incentive to belabor negotiations is evident, as Cox Communications, another new entrant into the wireless market, recently pointed out[12]; the longer the negotiations, the longer the market excludes a would-be competitor. BHN agrees with Cox's proposal for a shot clock to insure that negotiations are completed in a timely manner[13].

Just as cost-of-service showings constitute too much regulation, so "Trust us" is insufficient as a backstop methodology. Something more is needed here. So we also endorse Cox's view that the FCC mandate that the rate terms and conditions of data roaming agreements be publicly available[14].

This step, among other modest, non-common carrier approaches, falls well within the types of regulations the FCC has adopted in other areas. A review of FCC regulation *outside* of

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equivalent of CMRS roaming, should be treated like CMRS services pursuant to creation of the "functional equivalent" wireless category in 47 U.S.C. § 332(d)(3).

Second, as several parties in this proceeding point out, Section 316 of Title III provides the FCC broad authority to regulate radio licensees. The FCC in the *Report and Order* similarly noted Title III's expansiveness in the context of determining authority to fashion broadband management rules. Here, the proposed wireless data roaming requirement would be applied to Title III radio license holders; as the FCC noted in the *Report and Order*, ¶133, the FCC may change radio license terms under 47 U.S.C. §309(j)(3), even after licenses are awarded and even if affected licenses were awarded at auction.

These two aspects of the *Report and Order* support the FCC's authority to adopt data roaming rules.

[11] Several parties in addition to BHN argue for Commission review to determine whether data roaming rates are reasonable, *see* Letter filed by Cox Communications, Inc., WT Docket Nos. 05-265, 10-133 Dec. 29, 2010, at 3: "Such steps also will advance the negotiation of *reasonable* rates, as it has been Cox's experience that the roaming rates being offered by the major carriers, who are also Cox's primary competitors, are unreasonably high and hinder the ability of new entrants to devise and implement economically viable entry plans." (emphasis in original). *See also* Letter filed by SouthernLINC Wireless, WT Docket No. 05-265, Oct.21, 2010, at 10; Comments of T-Mobile (Filed June 14, 2010), at 20; Reply Comments of SouthernLINC Wireless (filed July 12, 2010), at 27-28.

[12] *See* Letter filed by Cox Communications, Inc., *supra* note 10: "These claims [about no difficulties in reaching agreements] have been belied by filings documenting the difficulties that various entities, including Cox, have encountered, and are still encountering, in attempting to negotiate reasonable data roaming agreements."

[13] Reply Comments of Cox Communications, WT Docket No. 05-265 (filed July 12, 2010), at 6-8.

[14] *Id.* at 3.

Title II reveals this: the agency has fashioned ways in many contexts to ensure that reasonable rates are charged by one entity to another. And none of these solutions arise in the context of a "common carrier" rate mandate. While some of the rate regulations were adopted in response to specific statutory instruction to do so[15], several came into being without such mandates and were part of the FCC's effort to effectuate more general statutory requirements.[16]

As the attached Table shows, there are no less than **19** different FCC regulations under Parts 73 (Radio broadcast services) and 76 (Multichannel video and cable television service) of Title 47 of the Code of Federal Regulations (CFR) that involve Commission-mandated price regulation, covering a wide variety of services and situations. ***All of them*** are outside of common carrier rate regulation under Title II. These examples demonstrate that the FCC is familiar with insuring reasonable rates to accomplish statutorily identified responsibilities, without resort to complex cost-of-service showings. Indeed many of these mandates for reasonable rates infrequently, if ever, rise to the level of a complaint to the FCC or a complicated adjudication. Their mere presence in Title 47 of C.F.R. acts as an incentive for parties on both sides of the table to meet the (often undefined) standard of "reasonable price" or "reasonable allocation."

A brief survey of the sections in the attached Table demonstrate the breadth of FCC experience in this area.

For instance, some of the FCC's pricing rules state that licensees may charge "reasonable cost" for printing or reproduction[17] or stipulate that an operator may include a "reasonable profit" in establishing rates for cable equipment leased to customers.[18] Others focus on rates charged to those who access networks, such as prices established by broadcast stations for retransmission consent;[19] or the lowest unit rate broadcasters or cable casters may charge to eligible candidates for public office.[20]

FCC rules specify that waivers of the FCC's multiple ownership rules may be obtained upon showing that no "reasonable" monetary offer from an entity outside the market has been received.[21] In its cable wiring rules, the Commission has established a definition of

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[15] For example, Congress mandated cable rate regulation, 47 U.S.C. § 543 (passim); rules allowing discounts for seniors and economically disadvantaged groups, *id.*, § 543(e); and open video system rate regulation, *id.*, § 573(b)(1). Even in these areas, Congress gave the Commission broad authority to devise workable rate regulation policies.

[16] Congress did not specify that the FCC adopt rules in many instances, e.g., regarding the "reasonable" costs paid by requesting parties for copies of documents in public inspection files, 47 C.F.R. § 73.3526(c); the "no reasonable offer" waiver standard of the multiple ownership rules, *id.*, § 73.3555 Note 7; the pricing rules of the cable home run wiring rules, *id.*, § 76.804; and rules relating to security deposits insurance for leased access users, *id.*, § 76.970(d).

[17] 47 C.F.R. § 73.3526(c).

[18] *Id.*, § 76.9223(c).

[19] *Id.*, § 76.65(a)(1).

[20] *Id.*, §§ 73.1942(a); 76.206(a).

[21] *Id.*, § 73.3555 Note 7.

"replacement cost" for cable home wiring[22] and permits an expert to assess a "reasonable price" for home run wiring in the case of a dispute.[23] And the FCC under its program carriage rules may order the "appropriate" price at which a video programming vendor's network will be carried.[24]

The FCC's leased access rules permit cable operators to require "reasonable security deposits" and impose "reasonable insurance requirements" on leased access programmers.[25] The rules also allow operators to extend "reasonable discounts" to senior citizens or economically disadvantaged groups.[26]

The FCC has had extensive experience with using benchmark rates in developing its cable rate regulations, from establishing presumptions about "reasonable" rates[27], including specific per-channel rates deemed to be presumed reasonable.[28] The Commission developed benchmark rules to define Title VI's requirement of "reasonable" basic rates and not "unreasonable" cable program service (i.e., expanded basic) tier rates[29], as opposed to mandatory cost-of-service showing to justify rates.

BHN is not endorsing the FCC's 1992 cable rate regulation scheme as wise or necessary policy, a conclusion in the main also reached by Congress itself in 1996 when it eliminated its expanded basic tier rate regulation mandate.[30] Nor is retail rate regulation proposed or necessary for this market. BHN and other new entrants, able to take advantage of wholesale data roaming where necessary, would increase the number of broadband providers for customers, a fact that would reduce, not increase, the market case for retail regulation.[3132]

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[22] *Id.*, § 76.802.

[23] *Id.*, § 76.804.

[24] *Id.*, § 76.1302(g).

[25] *Id.*, § 76.970(d).

[26] *Id.*, § 76.983(a).

[27] Congress mandated that the FCC establish regulations to "ensure that the rates for the basic service tier are reasonable." 47 U.S.C. § 543(b)(1).

[28] 47 C.F.R. § 76.934(h)(5)(i) (establishing a per channel rate of $1.24 for small systems and small cable companies).

[29] Congress mandated the FCC to establish criteria to identify rates for expanded basic cable services that "are unreasonable." 47 U.S.C. § 543(c)(2). The FCC implemented this mandate by establishing benchmarks by which rates would be deemed not "unreasonable."

[30] *Id.*, § 543(c)(4) ("Sunset of Upper Tier Regulation"). Many if not a majority of cable operators face effective competition and are no longer subject to basic rate regulation.

[31] The point simply is that cable rate regulation, however misguided, was a credible example of FCC authority to examine rates – in a more in-depth manner than BHN believes is necessary here – without resorting to Title II-style rate regulation. Congress did include a cost-based approach for basic rates, *id.*, § 543(b)(2)(C), which led to a cost-of-service alternative for operators to

Indeed, the FCC has used a lighter touch approach to pricing issues that provides more relevant guidance in the wholesale data roaming context. For instance, the FCC's program access rules generally prohibit unreasonable discrimination in prices charged by vertically integrated programmers to competing multichannel video programming distributors (MVPDs).[33] The prohibition, however, has a backstop rule that declares as *de minimis* price discrimination any price differentials between two MVPDs of less than or equal to five cents per subscribers, or five percent, whichever is greater. In short, if the differential is at or below these thresholds, no claim for unfair price discrimination by the distributor will ordinarily lie.[34]

And the Commission's open video system (OVS) rules have extensive "reasonable rate" requirements for video programming providers, even though none of them are based in Title II but in Title VI. And all of them express a lighter touch. Rates for carriage must be "just and reasonable."[35] The rule's presumption of "reasonable" rates completely avoids cost-of service analysis. Instead, the presumption operates this way: an OVS provider shows that its wholesale rate to a video programming provider is no higher than the average rates by paid unaffiliated programmers who occupy at least one third of the OVS system's capacity. If that simple test is met, the provider's rate is presumed to be reasonable. Where that presumption is not met, the OVS operator can avail itself of an imputed rate approach or "other market based approaches."[36]

To be sure, the foregoing analysis of Title III and VI price regulation illustrates varying degrees of "reasonable rate" specificity. Some rate provisions are detailed, such as the benchmark approach taken to cable rate regulation. Other, lighter touch efforts set up a presumption for reasonableness that, once met, puts the burden on the complainant. Still even lighter-touch approaches to assuring a rate backstop are illustrated in the regulations' numerous references to "reasonable" prices and charges, without further elucidation as to what "reasonable" means. These regulations simply enunciate a backstop "reasonableness" requirement and leave determination of when a price or charge fails to meet this standard to a complaint process.

The paucity of complaints associated with the many instances of rules that mention a duty of "reasonable" pricing, with an easily-applied standard – such as the *de minimis* program access standard, the lowest unit charge test in broadcasting and cable casting, or the reasonable pricing test for open video systems providers -- attests to the efficacy of this approach. Parties generally understand what is reasonable and comply, knowing that a rule can enforce each side's expectations. That approach is consistent with BHN's earlier recommendations for a backstop rule.

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defend rates when challenged. However, the overwhelming number of "reasonable" and not "unreasonable" rate reviews have been done under the FCC's benchmark rate approach.

[33] 47 C.F.R. § 76.1002(b).

[34] *Id.*, § 76.1003(e)(3)(i).

[35] *Id.*, § 76.1504(a).

[36] *Id.*, § 76.1504(e).

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BHN believes that the FCC has ample authority to establish a backstop rule requiring reasonable wholesale data roaming rates as part of its authority to authorize wireless data services. The incumbent LECs veer off course in suggesting that the FCC has no backstop rate authority absent a finding that data roaming is a common carrier service. Operators of broadcast, cable, and OVS facilities, as well as parties that interact with these entities, are subject to a host of "reasonableness" requirements relating to prices, terms, and conditions, as the preceding analysis demonstrates. No resort to Title II was necessary to enact these regulations. Nor is such the case with wholesale data roaming services.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Counsel for Bright House Networks, Inc.

Attachment: TABLE A, FCC NON-COMMON CARRIER RULES REQUIRING REASONABLE RATE BACKSTOPS

TABLE A
FCC NON-COMMON CARRIER RULES REQUIRING REASONABLE RATE BACKSTOPS

47 C.F.R. §	Subject Matter	Relevant Price, Terms Regulation Language
73.1942(a)	Candidate rates (broadcasting)	charges for use of cable system by candidate must be "the lowest unit charge of the system for the same class and amount of time for the same period..." candidate may not be charge "more per unit than the system charges its most favored commercial advertisers for the same classes and amounts of time for the same periods."
73.1944(a)	Reasonable access (broadcasting)	"...the Commission may revoke any station license or construction permit for willful or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."
73.3526(c)	Local public inspection file of commercial stations	"The applicant, permittee, or licensee may specify the location for printing or reproduction, require the requesting party to pay the reasonable cost thereof..."
73.3555, Note 7	Multiple Ownership	"One way to satisfy [waiver of ownership limits] would be to provide an affidavit ... affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received."
76.65(a)(1)	Good faith and exclusive retransmission consent complaints	"...television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms...."
76.206(a)	Candidate rates (cable casting)	charges for use of cable system by candidate must be "the lowest unit charge of the system for the same class and amount of time for the same period..." candidate may not be charge "more per unit than the system charges its most favored commercial advertisers for the same classes and amounts of time for the same periods."
76.802	Disposition of cable home wiring	operator may not remove cable home wiring unless it gives subscriber opportunity to purchase the wiring at "replacement cost"

76.804	Disposition of home run wiring	independent expert chosen "will be required to assess a reasonable price for the home run wiring"
76.922(a)	Rates for the basic service tier and cable programming service tiers	cable rates that do "not exceed the 'Initial Permitted Per Channel Charge' or the Subsequent Permitted Per Channel Charge' ..."will be accepted as in compliance
76.922(i)	Transition rates (cable)	systems with transition rates "must begin charging reasonable rates in accordance with applicable rules, other than transition relief, no later than" two years after effective date of rule terminating transition relief
76.923(c)	Rate for equipment and installation used to receive the basic service tier	"The Equipment Basket shall include a reasonable profit." "...the cable operator must provide .... a justification that its averaging methodology produces reasonable equipment rates."
76.625(b)(3)	Costs of franchise requirements	Cost of satisfying franchise requirements to support PEG channels includes a "reasonable allocation of general and administrative overhead"
76.934(h)(5)(i)	Small systems and small cable companies	"If the maximum rate established on Form 1230 does not exceed $1.24 per channel, the rate shall be rebuttably presumed reasonable."
76.950(a)	Complaints regarding cable programming service rates	"A franchising authority may file with the Commission a complaint challenging the reasonableness of its cable operator's rate for cable programming service."
76.957	Commission adjudication of the complaint	"The Commission will consider the complaint and the cable operator's response and then determine by written decision whether the rate ... is unreasonable or not."
76.970(d)	Commercial leased access rates	"Cable operators may require reasonable security deposits or other assurances from users who are unable to prepay in full for access to leased commercial channels. Cable operators may impose reasonable insurance requirements on leased access programmers."
76.983(a)	Discrimination	"No Federal agency . . . may prohibit a cable operator from offering reasonable discounts to senior citizens or to economically disadvantaged groups."

76.1003(e)(3)(i)	Program access proceedings	"When responding to allegations concerning price discrimination, except in cases in which the alleged price differential is *de minimis* (less than or equal to five cents per subscriber or five percent, whichever is greater), the defendant shall provide documentary evidence to support any argument that the magnitude of the differential is not discriminatory."
76.1302(g)	Carriage agreement proceedings	"...the Commission shall order appropriate remedies, including, if necessary, ...the establishment of prices, terms, and conditions for carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance...."
76.1504	Rates, terms and conditions for carriage on open video systems	"(a) *Reasonable rate principle.* An open video system operator shall set rates, terms, and conditions for carriage that are just and reasonable, and are not unjustly or unreasonably discriminatory." "(b) *Differences in rates.* (1) An open video system operator may charge different rates to different classes of video programming providers, provided that the bases for such differences are not unjust or unreasonably discriminatory." "(c) *Just and reasonable rate presumption.* A strong presumption will apply that carriage rates are just and reasonable for open video system operators where at least one unaffiliated video programming provider or ... providers ... occupy capacity equal to one-third of the system capacity ... and where any rate complained of is no higher than the average of the rates paid by unaffiliated programmers...." (d) *Examination of rates.* "...If a video programming provider files a complaint ... meeting the just and reasonable rate presumption, the burden of proof will rest with the complainant. If a complaint is filed .... That does not meet the just and reasonable rate presumption, the open video system operator will bear the burden of proof to demonstrate, using the principles set forth below that the carriage rates subject to the complaint are just and reasonable."